No. 12,722

IN THE

United States Court of Appeals

For the Ninth Circuit

California Motor Transport Co., Ltd., (a corporation), et al.,

Appellants,

vs.

The Fidelity and Casualty Company of New York (a corporation), and Bayly, Martin & Fay, Inc. of California (a corporation),

Appellees.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' PETITION FOR A REHEARING.

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To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellants respectfully petition for a rehearing upon the following grounds:

We believe that the opinion of this Honorable Court is based upon a misconception of fact. The crux of the case is that the policies sued upon never became

effective. They were never open for acceptance except on condition that the retrospective agreement would be executed and constitute a part of the contract. After reciting that the retrospective agreement and the policies were delivered to Bayly at the same time, the opinion states:

> "Fidelity did not then or at any time state that the new policies were not to be effective unless and until appellants executed the proposed agreement. Neither of the new policies contained any such statement or provision. The proposed agreement was not mentioned in either of the new policies. Appellants' failure to execute the proposed agreement cannot, therefore, be regarded as a rejection or refusal to accept the new policies."

The retrospective agreement *was* mentioned in the policies of insurance. Policy SPL 20950 contains an express reference to the retrospective plan in endorsement 8. The retrospective agreement, drawn by the same company and delivered at the same time, shows upon its face that it was to be a part and parcel of the policies. It recites that the primary policy SPL 20968 was to be issued, not independently, but "upon the security of this agreement". Mr. Mettalia testified that on delivering the policies and agreement, he told Mr. Cantlen "we wanted that signed so that this would be part of the renewal policy." The policies, without the agreement, are on a guaranteed rate basis and the evidence is undisputed that Fidelity would not consider issuing policies on a guaranteed basis. The testimony of Mr. Mettalia of Fidelity is conclusive in

this regard. From the time of the original negotiations in August, the discussions always concerned a rate that would be adjusted in accordance with the loss experience of the insured. (Mettalia, Tr. p. 130.) Fidelity would not even consider a primary rate of $2.00. (Mettalia, Tr. p. 128.) The company considered the execution of the agreement as an integral part of the declaration of the policies. (Tr. p. 244.)

Despite these uncontradicted facts, the Court rejects the contention that the new policies did not become effective, for the reason and upon the theory that if the policies were not effective (as the 60 day period referred to in the binder had expired), appellants, after October 31, 1946, would have been without coverage. This we respectfully submit, is not a proper conclusion.

Let us assume that these policies had not been written or delivered, but that everything else had transpired just as it did transpire. The 60 days had expired and there had been no express extension of the binder. However, premiums continued to be paid and accepted at the rate of the former policy and exactly as during the 60 day period. What then would be the conclusion? Would it be that the appellants were not covered by insurance after the 60 day period? This would necessarily follow if the conclusion of this Court is correct, that unless covered by the new policies appellants would have had no coverage after the expiration of the 60 days.

Clearly, such a conclusion would be entirely wrong. Inevitably, the conclusion would be that the status and arrangement existing during the 60 days, had been expressly or impliedly continued by mutual consent. The conduct of insurer and insured continued identically as during the 60 days. In the case of *Conner v. Garrett,* 65 C.A. 661, it is stated:

> "The agreement created a relation between the parties for a given time, out of which there arose reciprocal rights. When the parties, after the expiration of the time so limited, continued the relation by mutual consent, whether express or implied, it is to be inferred, in the absence of evidence to the contrary, that the respective rights growing out of the relation remained unchanged."

If the new policies had never been written, so long as Fidelity continued to accept premiums, it could never have successfully claimed that appellants were not covered. It would not be heard to say that its liability terminated at the expiration of 60 days.

It is apparent that this Honorable Court has arrived at the decision in the case upon the assumption that insurance could only have existed by virtue of the policies, and as insurance did exist, then these policies must have been in effect. The major premise is not true. Insurance would have existed without these policies.

The Court has not considered what would be the decision if the position of the parties had been reversed. Let us assume that the appellants were endeavoring to assert a claim under the new policies,

which did not exist under the former policy. Let us assume that the Fidelity raised the defense that the policies had never been accepted because the retrospective agreement had not been signed and the policies were only offered for acceptance in conjunction with the agreement. Let us assume that appellants contended that they were insured and therefore these policies must have been in effect. Under the undisputed facts in the case, no Court would have given such a contention on the part of appellants serious consideration. The answer, without the slightest doubt, would have been that appellants were covered for 60 days by binder and either expressly or impliedly that same coverage was continued by mutual consent.

According to the opinion, the binder expired on October 31, 1946, and the insurance coverage thereafter could only have been by virtue of these policies. If this were the case and it were as obvious as that, how can the Court account for the fact that Bayly did not consider the policies in effect? Bayly did not hold the policies for appellants. Bayly did not deliver the policies, because it considered that they would only become effective when and if the retrospective agreement was signed. Bayly did not seek to persuade Fidelity to reduce its bill for these premiums. It contended that there was no right on the part of Fidelity to charge premiums under these policies.

The opinion states that appellants and Fidelity treated the new policies as being effective. Certainly, there is no evidence whatsoever to indicate or support

an inference that appellants treated the policies as in effect. As for Fidelity, its conduct was the very opposite of what it would have been if it had treated these policies as in effect. It is inconceivable that Fidelity would have accepted or that Bayly would have processed returns and premiums at the rate of the former policy, if these policies had been considered effective.

The Court dismisses the appeal with respect to the liability of Bayly, Martin and Fay with the simple reference to Rule 52(a) of the Federal Rules of Civil Procedure. This rule has no applicabilty here, where the facts upon which the liability of Bayly is predicated are undisputed and uncontradicted. We respectfully suggest that the Court review that portion of Appellants' Brief devoted to the liability of Bayly. It is unmistakably clear that acceptance, if any may be deemed to have existed, could only have arisen through the act of Bayly. It is equally clear that Bayly never knew or believed the policies sued upon were open to or offered for acceptance. How may it then be said that if the policies were accepted by an act of Bayly, it is not responsible therefor?

This Court does not mention the fact that Bayly admittedly violated a positive duty imposed by law in retaining possession of the policies, if they were in effect.

Unfortunately, some facts have not been clearly presented to this Honorable Court. We sincerely believe that a miscarriage of justice will result if this

decision is permitted to stand. Appellants pray that a rehearing be granted so that the matter may be given further consideration.

Dated, San Francisco, California,
November 26, 1951.

Respectfully submitted,
NORMAN A. EISNER,
Attorney for Appellants and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
November 26, 1951.

NORMAN A. EISNER,
Counsel for Appellants and Petitioners.